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IN THE

Supreme Court of the United States

October Term, 1935.

No. 39

DE FOREST HULBURD,

Petitioner,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ Of Certiorari To The United States Circuit Court Of Appeals For The Seventh Circuit.

SUPPLEMENT TO PETITIONER'S REPLY BRIEF.

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May It Please The Court:

The purpose of filing this supplement is to cite additional authority in support of the points made in our Reply Brief.

With reference to page 17 of the respondent's brief and the claim that "the executor has a continuing status as the representative of the decedent" under Illinois law, we cite the following statement in *Horner's Probate Practice (3rd Ed.), p. 575, Sec. 256:*

> "If an administrator makes a final settlement after due notice, and is discharged, he is not liable for debts that are afterwards discovered, even if such debts are entitled to share in the property accounted for and distributed; the creditors' remedy is against the distributee or legatee, if no refunding bond has been filed, or on such bond if one be taken, for the creditors' use under the above statute."*

From the above quotation it appears that after the discharge of a representative of a decedent even as to claims not barred by limitation, suit must be brought against the distributee or legatee or on a refunding bond if one be taken.**

In *Klicka v. Klicka, 105 Ill. App. 369,* at page *372,* the Court holds that no refunding bond may be required by a representative of a decedent except to protect him against claims presented within the time allowed by the *Administration Act* for presenting them. (Then two years, but reduced to one year before the period in controversy.)

FURTHER AUTHORITY ON THE RIGHT OF THE CIRCUIT COURT OF APPEALS TO CONSIDER THE QUESTION OF THE LIABILITY OF THE LEGATEE.

The first rule for appeals from the Board of Tax Appeals, which the Conference of Judges of the Circuit Court of Appeals adopted at the suggestion of the late Chief Justice Taft provides that the appeal petition:

> "shall contain assignments of error separately stated and numbered in respect of each and every error asserted and intended to be argued".

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* The 1935 edition of the Illinois Revised Statutes, published under the Auspices of the Illinois State Bar Association by Callaghan & Co., containing the Administration Act, is keyed in by the publishers to Horner's Probate Practice which is the leading Text Book on the Illinois law of estates.

** The executor here gave written notice to the respondent to present his claims (R. 27).

The assignment of errors contained in this record (R. 86) consists of three errors, none of which allege any error on the part of the Board in failing to decide that petitioner was liable as a legatee.

The rules which the Circuit Court of Appeals have adopted to govern other appeals provide that the Court may notice a plain error not assigned, but apparently this rule means that the point upon which the plain error appears must have been raised in the Court below. (Note *Wood v. A. Wilberts Sons Shingle & Lumber Company, et al., 226 U. S. 384,* at page *386.)*

It is settled that after the Board has handed down its decision, but before it has entered a final order on its records, a new point may not be raised under rule 50. *(Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308; 313;* see also *Fifth Avenue Bank of New York, 32 B. T. A. 701.)* Of what avail is this rule if a new point may afterwards be raised in the Circuit Court of Appeals?

COMMENT ON THE MERITS.

The case of *Knatchbull v. Hallett, L. R. 13 Ch. 696,* cited on page 30 of respondent's brief, contains this important statement at page *708:*

> "It is not disputed that the money remained at his bankers mixed with his own money at the time of his death; that is, he had not drawn out that money from his bankers."

Again it is said at page *731:*

> "It is further to be noted and it is to my mind a material circumstance, that the balance to the credit of the account never fell below the aggregate of the two sums of trust moneys."

All of which is respectfully submitted.

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